United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL
WITH PROOF
OF SERVICE

77-7156

To be submitted by
MICHAEL R. TREANOR

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

BISWANATH HALDER,

Plaintiff-Appellant,

-against-

P/S

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF ON BEHALF OF DEFENDANT-APPELLEE

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Plaintiff-Appellant,

-against-

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Defendant-Appellee

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE

QUESTIONS PRESENTED

1. Whether denial of plaintiff's motion to amend his complaint for the second time prevented plaintiff from litigating his entire claim on the merits.

2. Whether the Court below abused its discretion in limiting disclosure.

THE FACTS

This action was commenced by the filing of the summons and complaint in the United States District Court for the Eastern District of New York on October 29, 1974. The summons and complaint were served on ITT on November 7, 1974. Issue was joined on November 26, 1974.

The original complaint alleged a continuing course of discrimination by ITT against plaintiff. By notice of motion dated January 2, 1975, plaintiff moved to amend his complaint to add allegations that he had made 12 different job applications to nine of ITT's "businesses" and each was rejected because of plaintiff's national origin. The motion was granted by order dated February 24, 1975. On April 22, 1975, the amended complaint was served and on April 30, 1975, an answer to the amended complaint was served.

Then, by notice of motion dated May 22, 1975, plaintiff moved to amend his complaint again. This time plaintiff sought to add additional defendants and to add a claim under 42 U.S.C.A. 1981. The proposed second amended complaint also charged that plaintiff was discriminated against not just because of his national origin but because of his color, religion and alienage. This motion was denied by order dated February 11, 1976.

Plaintiff served two sets of interrogatories on defendant. The first set was served on January 28, 1975. By order dated February 11, 1976, the Court below denied plaintiff's motion to serve a second amended complaint and denied motions for summary judgment but granted his motion to compel answers to "proper interrogatories."

On December 30, 1976, defendant served answers to the "proper interrogatories." Plaintiff responded, by notice of motion dated January 10, 1977, with a second motion to compel answers to the interrogatories. This motion was denied by order dated February 28, 1977.

On January 10, 1977, plaintiff served the second set of interrogatories which were answered on March 1, 1977, fully and without objection.

On March 3, 1977, the case was tried before Judge Mishler. Plaintiff offered no evidence in support of his claim. After hearing defendant's proof, the Court below ordered judgment to be entered in favor of defendant.

POINT I

PLAINTIFF'S MOTION FOR LEAVE TO SERVE A SECOND AMENDED COMPLAINT WAS PROPERLY DENIED

The proposed second amended complaint differs from the amended complaint in three respects. First, it adds as named defendants three of ITT's subsidiaries. Second, it adds a claim that plaintiff was discriminated against because of "his color, religion, national origin and alienage." (para. 12). And third, the proposed second amended complaint prays for relief under the Civil Rights Act of 1964 "as well as the Civil Rights Act of 1866." (para. 16).

Leave to amend for a second time was properly denied for several reasons, chief among them that the additional allegations added nothing to plaintiff's claim. Plaintiff's claim is based on a continuous and continuing pattern of discriminatory conduct on the part of ITT and its subsidiaries. Only that theory avoids the defense of lack of subject matter jurisdiction. The Court below considered that defense and held that despite only one EEOC complaint by plaintiff relating to but a single employment application, all of the employment rejections listed in the amended complaint were properly before the Court as constituting "an ongoing continuous pattern of discrimination..."(Memorandum of Decision and Order, Feb. 24, 1975).

The additional allegations of discrimination because of color, relition and alienage are not an expansion of the term "national origin." They are mere components of "national origin", particularly when it comes to Indian nationals. In any event, the Court below never precluded plaintiff from proving any claim plaintiff might have based on color, religion or alienage. In its Memorandum of Decision and Order dated Feb. 11, 1976, the Court below denied plaintiff's motion to amend his complaint again but stated that: "Plaintiff will have sufficient relief for racial, religious, or alienage discriminatory practices under Title VII of the Civil Rights Act of 1964."

Plaintiff contends that he should have been permitted to plead the Civil Rights Act of 1866. The Court below considered this contention and held that 42 U.S.C. 1981 does not protect against discrimination due to national origin. (Memorandum of Decision and Order, Feb. 11, 1976). In any event, plaintiff was not precluded from proving facts on the trial which might support a section 1981 claim.

Plaintiff failed to prove a case under either Civil Rights Acts because he had no claim, not because he was denied permission to plead a claim. Rule 15(a) of the Federal Rules of Civil Procedure provides in pertinent part that "a party may amend his pleading only by leave of court...and leave shall be freely given when justice so requires." The rule is intended to insure that cases are decided on their merits rather than on technicalities. Reaves v. Sieloff, 382 F. Supp. 472 (D.C. Pa., 1974). The present case was tried on its merits and no defect or deficiency in the complaint prevented plaintiff from proving his claim.

POINT II

THE COURT BELOW PROPERLY LIMITED DISCLOSURE

Plaintiff propounded two sets of interrogatories. He never sought any other discovery. The first set of interrogatories was objected to in part by defendant. The second set was answered fully by the defendant.

The first set of interrogatories sought information relative to defendant's methods of hiring computer programmers and analysts, and prior employment discrimination claims and suits. This information was provided with respect to defendant and all ITT subsidiaries mentioned in the amended complaint. Interrogatories numbered 4, 5, 6 and 9 were objected to on the grounds of burdensomeness and irrelevance. The Court below sustained these objections. (Memorandum of Decision and Order, Feb. 28, 1977).

Interrogatory 4 sought information about each and every advertisement for computer programmers and analysts from June 1, 1969, and what transpired after each advertisement. Interrogatory 5 sought, in effect, the personnel file on every computer programmer and analyst hired by ITT or its subsidiaries since June 1, 1969. Interrogatory 6 sought, in effect, the personnel file on every programmer and analyst now working for ITT or its subsidiaries. Interrogatory 9 demands details relative to "any person of a minority race, ethnic group, religious group or national origin"who has been denied employment by ITT "for any reason whatsoever."

Defendant underlined its objection on the basis of burdensomeness by pointing out that ITT and its subsidiaries had approximately 153,000 employees as of the end of 1971 of whom close to one thousand were in the computer field. (Defendant's answers to interrogatories, para. 5 and 6).

But plaintiff was not denied the opportunity to have full disclosure on the matters covered by the interrogatories in dispute. His supplemental interrogatories narrowed plaintiff's search. Interrogatory number 1 reads:

> "With respect to each and every rejection of employment application of the plaintiff as mentioned in paragraph five of the amended complaint, state in detail the reasons for the rejections. State also why the successful applicants were preferred over the unsuccessful plaintiff."

All information available to defendant was given to plaintiff in response to that interrogatory.

It is conceded that the decision in this case should not rest on the pro se plaintiff's skill in crafting interrogatories. But the Court below insisted, and defendant so consented, that plaintiff be permitted to inspect the records maintained by defendant relative to the nationality of its computer personnel. The Court below did not deny

discovery to plaintiff but rather directed that it be provided in a manner which would obvi defendant's objections. Plaintiff did not avail himself of this opportunity.

Defendant does not dispute the legal principles or the philosophy ennunciated by the cases relied on by plaintiff. But defendant does dispute any claim that full disclosure of potentially relevant material was denied. The facts are fatal to plaintiff's position. As the Court below noted:

> "...the plaintiff has not made use of the discovery granted him by the oral ruling of February 10, 1976. Pursuant to that ruling, the defendant offered the plaintiff the opportunity to inspect records maintained by ITT with respect to the nationality of its computer employees. The offer remains unaccepted." (Memorandum of Decision and Order, Feb. 28, 1977).

The defendant has provided or offered to provide all information in its possession relative to plaintiff's job applications and the nationality of its computer employees. Plaintiff had every opportunity to discover possibly relevant information and to establish his claim. He deliberately refused both opportunities.

CONCLUSION

ON THE FACTS OF THIS CASE AND THE LAW APPLICABLE THERETO, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

RESPECTFULLY SUBMITTED,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th ROAD MASPETH QUEENS, 11378

That on the 7th day of July 1977, deponent personally served the within Brief on behalf of Defendant-Appellee upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

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Robert La Grassa

Sworn to before me this
7th day of July, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979